IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 126 of 1998
With
CRIMINAL APPEAL No. 511 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	
5	Whether it is to be circulated to the civil judge ?	

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SAVDAS RAJSI BHATU - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR HN JOSHI FOR M/S THAKKAR ASSOC. for Appellant-Convict.
MR PD BHATE, LD.APP for Respondent-STATE

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 01/10/2007

COMMON ORAL JUDGMENT

1. Both these appeals are arising out of one judgment and order of conviction and sentence dated 28th January 1998 passed by the learned Special Judge, Panchmahals at Godhra, in Special Case No.3 of 1996, and therefore, the

same are heard together and decided by this common judgment.

2. The appellant-orig.convict of Criminal Appeal No.126 of 1998 (hereinafter referred to as 'the appellant-convict') has preferred the said appeal under Section 374 of the Code of Criminal Procedure, 1973, challenging the aforesaid judgment and order, whereby the learned trial Judge has held the appellant guilty for the charge of offence punishable under Sections 15 and 18(6) of the Gujarat Essential Commodities (Licensing Control and Stock Declaration) Order, 1981 (hereinafter referred to as 'the Order, 1981') read with Sections 3 and 7(1)(a)(2) of the Essential Commodities Act, 1955 (hereinafter referred to as 'the Act') and sentenced him to undergo simple imprisonment for three months and to pay a fine of Rs.2000/-, in default to undergo simple imprisonment for 15 days. The appellant-convict has also been held guilt for breach of Section 5 of the Motor Spirit and

High Speed Diesel (Prevention of Malpractices in Supply and Distribution) Order, 1990 (hereinafter referred to as 'the Order, 1990') read with Sections 3 and 7 of the Act and sentenced to undergo simple imprisonment for three months and to pay a fine of Rs.2000/- and in default to undergo simple imprisonment for 15 days. It is ordered that the sentences shall run concurrently.

3. The another appeal i.e. Criminal Appeal No.511 of 1998 has been preferred by the appellant-State under Section 377 of the Code of Criminal Procedure, 1973, for enhancement of sentence, and the grievance of the appellant-State is that the appellant-convict has not been sentenced adequately, otherwise he deserves more severe punishment than imposed. So this Court by confirming the judgment and order of conviction may impose more severe punishment and also enhance the amount of fine because the appellant-convict was found with illegal stock of 5000 litres of High Speed

Diesel (hereinafter referred to as 'HSD') and this stock of HSD was lying in a tank. The appellant-convict was physically present when the inspection was carried out. In such a situation, the learned trial Judge ought not to have imposed such a lenient punishment of simple imprisonment for three months. The amount of fine of Rs.2000/- is also meager amount.

4. I have heard Shri H.N. Joshi, learned counsel appearing on behlaf of M/s.Thakkar Associates for the appellant-convict and Shri P.D.Bhate, learned Additional Public Prosecutor, for the respondent-State in both the appeals. They have taken me through the basic case of the prosecution and the evidence led during the course of trial, including the documentary evidence.

5. As per the case of the prosecution, on 20th December 1990, a surprise checking which has been referred to as inspection in the evidence

led by the prosecution, was carried out during night hours by two officers of the Civil Supply Department of State of Gujarat i.e. one Jivabhai Chehorbhai Desai and Mohanbhai Parmabhai Jadav. It is alleged that the appellant-convict was present at the factory premises which was inspected and in his presence, a detailed panchnama was drawn. The varieties of petroleum products were found in the factory of the appellant, but the Inspecting Officer found that in one of the tanks there was a stock of 5000 litres of HSD. By climbing stairs they had verified and measured the quantity of the stock, but on verification of the Stock Register maintained by the business firm, allegedly by the appellant-convict, the team found that this stock is not reflected in the said register. On the contrary, the register was showing nil stock of HSD. Some departmental proceedings were undertaken and thereafter, on 05th August 1991 the authorised officer filed a formal complaint with the Halol Police Station and

the same was registered as FIR for the offences punishable under Section 3 read with Section 7 of the Act. On 06th August 1991, the police drawn a formal panchnama of the place of incident. It is alleged that after inspection, the stock of HSD was handed over to the appellant-convict who was present at the spot with necessary directions and the appellant had thereafter accepted the stock handed over to him as HSD stock. On 17th August 1996 on completion of investigation, the police filed the final report.

6.1 According to Shri H.N. Joshi, learned counsel appearing for the appellant-convict, many crucial aspects are not a matter of dispute. However, it is seriously disputed by the appellant-convict that actually the factory was closed when it was inspected and the appellant-convict was not present at site of the factory, but he was called after arrival of the inspecting officers and the staff members. Shri H.N. Joshi has taken me through

various grounds of challenge mentioned in the memo of the appeal. However, while concentrating his arguments Shri Joshi has submitted that the finding of guilt recorded by the learned trial Judge is erroneous because the evidence has not been appropriately appreciated and the appellant-convict could have been given benefit of doubt on the ground that the prosecution has not successfully proved that the stock which was found in a tank by the Inspecting Officers was the HSD only, which has been defined in Order, 1990 because the Motor Spirit and HSD defined under the said Order, 1990 only would fall in the category of either Motor Spirit or HSD. There are varieties of petroleum products and even diesels are also of different types. When the prosecution has not proved that the stock which was seen by them was HSD defined in Order 1990, the appellant-convict ought not to have been held guilty for the charge in question. If this Court finds that there is infirmity in the evidence led by the

prosecution in this regard, the appellant-convict could not have been held guilty for violating any provision of the Order, 1981.

6.2 Undisputedly, the appellant-convict and his firm are engaged in manufacturing varieties of petroleum products and they are using different types of petroleum products and varieties of crude oils, diesel, etc. in their manufacturing activities. There is reference of other such varieties in the panchnama drawn and for that the appellant has not been found responsible as those articles (materials) do not fall under the category of either Motor Spirit or HSD or any other petroleum product that can be covered under the definition of 'Essential Commodity'. There was no such prosecution or charge. It is submitted by Shri Joshi that if this Court finds that the judgment and order of conviction recorded by the learned trial Judge is bad and is not sustainable in the eye of law on this point only, the question of enhancement of punishment would not arise, otherwise the

punishment cannot be said to be inadequate because ultimately it was a matter of discretion of the learned trial Judge and the learned trial Judge was legally entitled to take a liberal view keeping in mind the totality of facts and circumstances of the case. This is not a case of failure in exercising discretionary jurisdiction.

6. Before appreciating the various aspects pointed out by Shri P.D. Bhate, learned Additional Public Prosecutor, it is necessary to consider whether there is adequate evidence to show that the stock found by the Inspecting Officers was actually HSD defined under Section 2(d) of the Order, 1990 or not. It would be beneficial to reproduce the said Section 2(d), which reads as under:

> *"Section 2(d) : "high speed diesel" means any hydrocarbon oil (excluding mineral colza oil and turpentine substitute) which has its flash point at or above 25 degree Celsius and is*

suitable for use as fuel in compression ignition engines."

7. There is enough force in the say of Shri H.N.Joshi that the Members of the Inspecting Team, mainly the officers of the Civil Supply Department ought to have drawn sample in accordance with the scheme of Section 8 of the Order, 1990 which provides for sampling procedure. This Court has held that the scheme of Section 8 is mandatory and violation of Section 8 while drawing the sample would go to the root and authenticity of the ultimate finding, which may be recorded by the expert analyst. The said Section 8 of Order, 1990 reads as under :

"Section 8 : Sampling procedure.- (1) The Officer authorised in clause 7 shall draw the sample from the tank, nozzle, vehicle or receptacle as the case may be to check whether density of the product conforms to requirements indicated in the Schedule I.

(2) The Officer authorised in clause 7 shall take, sign and seal three samples of 750 ml. To 1 litre each of the produce, one to be given to the dealer, transporter or concerned person under acknowledgment with instructions to preserve the sample in his safe custody till the testing/ investigations are completed, the second sample to be kept by the concerned oil company or department an the third to be used for laboratory analysis.

(3) Samples shall be taken in clean glass or aluminium containers (Plastic containers shall not be used for drawing samples).

(4) The sample label should be jointly by the officer who has drawn the sample, and the dealer or transporter or concerned person or his representative and label shall contain

information as regards the product, name of retain outlet, quantity of sample, date, name and signature of the officer, name and signature of the dealer or transporter or concerned person or his representative.

(5) The authorised officer, shall send the third sample of the product taken under sub-clause (2) within 10 days to any of the laboratories mentioned in Schedule II appended to this Order for analysis within a vivew to checking whether the density of the product conforms to requirements indicated in Schedule I."

8. In the present case, no sample was drawn and the material which was found by the Inspecting Officer was HSD, is mentioned in the panchnama drawn, was the result of subjective satisfaction of the said officer. As per the Rule of best evidence, the prosecution ought to have produced the report of the Public

Analyst to prove that the stock was nothing else but the HSD. Merely because the Inspecting Officer has deposed before the Court that it was HSD, such an oral evidence can be said to be a weak piece of evidence without any support of scientific, cogent and convincing evidence.

9. By pointing out one analogous provision, Shri Joshi has placed reliance on the decision of Madras High Court in the case of ***Ayub Khan and others v. State, reported in 1998(2) Crimes 119.*** In the case before the Madras High Court, the appellants, driver and cleaner, were found transporting 200 litres of petrol and 160 litres of Diesel in cans and the allegation was that the said act was in contravention of Tamil Nadu Spirit and High Speed Diesel oil (Maintenance and Regulation of supplies) Order, 1980. In this cited decision, no sample was taken and sent to laboratory to find out whether the liquid found was High Speed Diesel oil. The Court held that conviction in such a

case is unsustainable. It is not necessary to reproduce the relevant paragraph no.6 of the cited decision.

10. Here it would be beneficial and relevant to refer to one decision of the Kerala High Court in the case of ***Poomadathil Kunhimoideen Kutty and another v. State of Kerala, reported in 1988 EFR 498***. The High Court quashed and set aside the judgment and order of conviction and sentence saying that in absence of report from Chemical Analyser, the conviction cannot sustain. The High Court was evaluating Clause 16 of the Kerala Kerosene Control Order, 1968, which contains prohibition that no person (other than an oil company or a dealer licensed under the Order) shall have in his possession kerosene exceeding one tin (18.5 litres). Thus, the contravention of the said clause would fall in the category of offence punishable under Section 7(1) of the Act. The officer had seized the stock of kerosene. Neither the sample was drawn by the seizing officer from the barrel in which the stock of

kerosene was lying nor the entire stock with barrel was sent for analysis. The High Court considered Clause 2(A) of the said Order, 1968 i.e. definition of 'kerosene'. The Court found that the prosecution mainly relies on the testimony of the officer concerned that when the liquid was smelt, it was found to be kerosene, and thus, the liquid was identified as kerosene. The learned trial Judge had accepted their version and had reached to a conclusion that the accused concerned was having excess quantity than the permitted one. After referring to the decision of the Division Bench of the Kerala High Court in the case of ***State of Kerala v. Sreedharan, reported in 1965 KLT 1002***, ultimately, quashed and set aside the conviction. It would be useful to reproduce the relevant paragraph nos.5 and 6 of the cited decision because the reasonings given by the Kerala High Court would clinch the issue in the present case, which are as under :

“5. Clause 2(a) of the Order

defines kerosene thus : “Kerosene shall have the meaning assigned to it an item No.7 of the first schedule to the Central Excise and Salt Act, 1944 (Control Act 1 of 1944) and shall not include Aviation Turbine Fuel:” Item No.7 in the First Schedule to the Central Excise and Salt Act, 1944 defines kerosene as “any mineral oil (excluding mineral colza oil and turpentine substitute) which has a flame height of eighteen millimetres or more and is ordinarily used as an illuminant in oil buring lamps”. In explanation II (of the said item) it is mentioned that “Flame height” shall be determined in the apparatus known as the smoke point lamp in the manner prescribed in this behalf by the Central Government by notification in the Official Gazette”. Explanation-I of the said item defines mineral oil as an oil consisting of a single liquid

hidro carbon or a liquid mixture of hidro carbons derived from petroleum coalshale, peat or any other bituminous substance and includes any similar oil produced by synthesis or otherwise.

6. The definition postulates that the liquid must have a particular standard, if it is to be treated as kerosene under the Order. It shall not only be mineral oil of a particular variety mentioned therein, but its flame height shall be of a specified range. In other words if the range of the flame height is even one millimetre less than the standard fixed, the liquid would not be regarded as kerosene as defined in the Order, even if it has the smell of kerosene and can be used as kerosene for any purpose. Is it possible to determine that the liquid involved in these cases had the standards prescribed for kerosene without conducting scientific analysis

or chemical examination of its sample ? It does not require much effort to convince any one that the opinion formed by a person without conducting any scientific test is likely to go wrong. Moreover, it is almost impossible for any human being, however, experienced he may be, to pronounce opinion regarding the scientific standard of any stuff merely by smelling it. At the most such a person may be able to make an approximation of the quality or standard by smelling a thing, or even by testing it. Whenever a particular scientific standard is fixed for a commodity the ascertainment must be made by by subjecting it to scientific test. Opinions formed by looking at it, smelling it or testing it cannot be proper substitutes for results of scientific or chemical analysis. The position may perhaps be different if no

standard as such is fixed for a particular commodity or article the possession of which amounts to an offence."

11. The view of Punjab and Haryana High Court is also very similar to the view taken by the Kerala High Court and the Madras High Court. In the case of ***Jay Prakash v. State of Haryana, reported in 1990(1) EFR 394***, the High Court accepting the argument that the sample of kerosene taken out in a glass bottle by the Seizing Officer ought to have been sent for Chemical Analysis. The Court observed that it can be produced that when a sample was taken out, the same must have been sent to analysis for laboratory but no report has been tendered to the Court as to what was the result of the analysis. For short, the ratio of the decision of the Punjab and Haryana High Court is that the prosecution is under obligation to produce the report of the Public Analyst to establish that a particular petroleum liquid falls under the category of either kerosene or Motor

Spirit or HSD.

12. In the present case, the officers of the Civil Supply Department have stated that the said stock was HSD, and was returned to the appellant as HSD. When the entire stock was accepted by the appellant as HSD whether the appellant can say that the stock was not HSD, is also a question posed. But it would not be either legal or proper for this Court to accept anything from the appellant (orig.accused). As per the settled legal principle of criminal jurisprudence, it is the obligation of the prosecution to bring home the charge beyond reasonable doubt by leading cogent and convincing evidence. The appellant is not supposed to say anything. Merely because he had accepted, that too symbolically, the stock which was lying in the concerned tank, it cannot be said that he has admitted a particular aspect or fact mentioned in the seizure memo. On the contrary, “zero” balance in the stock register ought to have tempted the officers to draw sample as per

Section 8 and the finding of the Forensic Science could have helped the prosecution in falsifying the record maintained by the appellant; otherwise it is not possible for this Court to say that the register was also not maintained properly.

13. The Court is conscious that the decisions of the said three different High Courts have persuasive value and this Court can take a different view than the other Courts. But I am of the view that there must be harmony in the law, especially the law which mainly has application through out the country like Essential Commodities Act, Drugs Control Act, Food Adulteration Act or law related to fertilizers, etc. We have federal structure but the harmonized legal finding would help the litigants, business personnel and various companies having their business places in different States of our country. Such harmony can also help in National integration. If the judgments of the other High Courts are not found apparently erroneous or infirm, they may

be taken as guarding element as they have no binding element in stricto senso. In the present case, a person having factory was prosecuted by the Civil Supply Department alleging that he was holding stock of more than 220 litres of HSD. A person like the appellant is authorised to have 220 litres of HSD. So accepting the ratio of above referred decisions, I am inclined to say that in absence of report from the Chemical Analyser/ Public Analyst, the learned trial Judge ought not to have linked the appellant with the crime. The stock found with the appellant, without entering into merits as to whether the appellant was present or not, has not been proved to be the stock of HSD defined under Section 2(d) of the Order, 1990. As per the rule of best evidence, the prosecution ought to have led the scientific evidence to prove this aspect that the stock was nothing but the HSD.

14. The other fold of argument advanced by Shri Joshi has also some force. Ultimately, it is

the say of the prosecution that the factory premises inspected was run by a partnership firm and only the appellant being the person present was prosecuted. Considering the definition of “Company” as per Section 10 of the Act, the concerned firm ought to have been joined as accused, otherwise it would cause serious prejudice to one partner and this has been observed in more than one case. The said Section 10 of the Act reads as under :

> “Section 10 : (1) If the person contravening an order made under Sec.3 is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly;
>
> Provided that nothing

contained in this Sub-section shall render any such person liable to any punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.

(2) Notwithstanding anything contained in Sub-sec.(1) when an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any direct, manager, Secretary or other officer of the company, such director, manager, Secretary or other officer shall also be deemed to be proceeded against and punished accordingly."

15. The Apex Court in the case of ***Sham Sundar and others v. State of Haryana, reported in AIR***

1989 SC 1982, has observed as under :

> *"7. Counsel for the State, however, relied upon the legal liability of partners and he argued that it would be for the accused partners to prove that the offence was committed without their knowledge or in spite of exercising due diligence on their part. He relied upon the proviso to sub-section (1) of sec. 10. It is true that under the Indian Partnership Act, 1932, a 'firm' or 'partnership' is not a legal entity but is merely an association of persons agreed to carry on business. It is only a collective name for individuals, carrying on business in partnership. The essential characteristic of a firm is that each partner is a representative of other partners. Each of the partners is an agent as well as a principal. He is an agent in so far as he can bind the other partners by*

his acts within the scope of the partnership agreement. He is a principal to the extent that he is bound by acts of other partners. In fact every partner is liable for an act of the firm. Section 2(a) of the Partnership Act defines an "act of a firm" to mean any act or omission by all the partners, or by any partner or agent of the firm which gives rise to a right enforceable by or against the firm.

8. But we are concerned with a criminal liability under penal provision and not a civil liability. The penal provision must be strictly construed in the first place. Secondly, there is no vicarious liability in criminal law unless the statute takes that also within its fold. Section 10 does not provide for such liability. It does not make all the partners liable for the offence whether they do

business or not.

9. It is, therefore, necessary to add an emphatic note of caution in this regard. More often it is common that some of the partners of a firm may not even be knowing of what is going on day to day in the firm. There may be partners, better known as sleeping partners who are not required to take part in the business of the firm. There may be ladies and minors who were admitted for the benefits of partnership. They may not know anything about the business of the firm. It would be a travesty of justice to prosecute all partners and ask them to prove under the proviso to sub-section (1) that the offence was committed without their knowledge. It is significant to note that the obligation for the accused to prove under the proviso that the offence took place without his

knowledge or that he exercised all due diligence to prevent such offence arises only when the prosecution establishes that the requisite condition mentioned in sub-section (1) is established. The requisite condition is that the partner was responsible for carrying on the business and was during the relevant time in charge of the business. In the absence of any such proof, no partner could be convicted. We, therefore, reject the contention urged by counsel for the State.

10. We have perused the evidence of the prosecution. Santlal Inspector, Food and Civil Supplies (PW 1) has deposed that the accused were partners of the firm. He has stated that the statement Ex. P. 8 regarding purchase of paddy and supply of levy rice was signed by Lajpat Rai as partner on behalf of the firm. The rest of his

statement relates to the short supply of levy rice, and it does not indicate that other partners were also conducting the business during the relevant time. The statement of PW-3 who investigated the case does not indicate anything further. He has seized the relevant documents like stock register and recovery memo and arrested all the four accused. These documents do not indicate even remotely that all the partners were doing thebusiness of the firm. There is no other evidence on record on this aspect. With these tit-bits, it is impossible to hold that when the offence was committed all the partners were conducting the business of the firm. However, Lajpat Rai accused No. 3 cannot escape the liability. The material on record indicates that he was conducting the business of the firm and in fact, he has signed the

statement Ex. P. 8 on behalf of the firm. His conviction cannot therefore be disturbed. But the conviction of other partners is absolutely uncalled for.

11. In the result we allow the appeal, set aside the conviction and sentence of appellant Nos. 1, 2 and 4 and acquit them from all the charges. The conviction and sentence of appellant No.3, however, are maintained."

16. As in the present case, neither the firm nor any other partner was joined as accused, it was not safe for the learned trial Judge to link the appellant with the crime, merely because he was present at the spot as alleged. His presence at the relevant point of time may be incidental or accidental.

17. In view of aforesaid observations and discussion, the Criminal Appeal No.126 of 1998

filed by the appellant-orig.convict is hereby allowed and obviously, the Criminal Appeal No.511 of 1998 for enhancement of sentence does not survive and hence, the same is hereby dismissed. The judgment and order of conviction and sentence dated 28th January 1998 passed by the learned Special Judge, Panchmahals at Godhra in Special Case No.3 of 1996, is hereby quashed and set aside. The appellant-orig.convict of Criminal Appeal No.126 of 1998 is ordered to be acquitted from all the charges levelled against them in respect of the offences in question. The amount of fine, if any paid, be refunded to the appellant on his proper identification. The bail bond stands discharged.

(C.K. Buch, J)

Aakar